(16,961.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 376.

D. P. TARPEY, PLAINTIFF IN ERROR,

vs.

ANDREW MADSEN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 9, 1898.

a In the Supreme Court of the State of Utah.

D. P. TARPEY, Appellant,
v.
ANDREW MADSEN, Respondent.

Marked: No. 911. Filed Feb. 11, 1898. Lilburn P. Palmer, clerk supreme court of Utah.

1 In the District Court of the Fourth Judicial District, Territory of Utah, County of Weber.

D. P. TARPEY, Plaintiff,
v.
ANDREW MADSEN, Defendant.
} Complaint.

Plaintiff complains and alleges:

That on January 12, 1892, the plaintiff was seized in fee and possessed and entitled to the possession of that certain tract of land situated in Box Elder county, Utah Territory, described as follows:

The southwest quarter of section twenty-nine, in township eleven (11) north, of range two (2) west, of the Salt Lake meridian, U. S. survey.

That while the plaintiff was so seized the defendant afterwards, on the 12th day of January, 1892, and without right or title, entered into the possession of the demanded premises and ousted and ejected the plaintiff therefrom, and now unlawfully withholds the possession thereof from the plaintiff, to his damage in the sum of $100.00.

That the value of the rents, issues, and profits of said premises from the said 12th day of January, 1892, and while the plaintiff has been excluded therefrom by the defendant is $25.00 per month.

2 That plaintiff claims title to the said above-described piece of land by reason of a conveyance thereof to him from the Central Pacific Railroad Co. as successor in interest for the Central Pacific Railroad Co. of California, by and under the provisions of the act of Congress of the United States approved July 1st, 1862, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the Government the use of the same for postal, military, and other purposes," and of an act amendatory thereof, passed by the Congress of the United States and approved July 2, 1864, entitled "An act to amend an act entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the Government the use of the same for postal, military, and other purposes,' approved July 1, 1862;" that the defendant herein pretends to have some title to said land by reason of a patent of the United States therefor, issued subsequent to the taking effect of the said acts and the grant thereunder, and

the said action involves the construction of the acts hereinbefore referred to and other acts amendatory thereof.

Wherefore the plaintiff demands judgment against the defendant for the recovery of the possession of the demanded premises, and the sum of $100 damages for the withholding possession thereof, and for the sum of $25.00 per month from January 12, 1892, for the value of the said rents, issues, and profits and costs of suit.

EVANS & ROGERS,
Attorneys for Plaintiff.

3 TERRITORY OF UTAH, } ss:
County of Weber, }

D. P. Tarpey, being first duly sworn, says that he is the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge.

D. P. TARPEY.

Subscribed and sworn to before me this December 27th, 1893.

L. R. ROGERS,
Notary Public.

Filed January 12, 1894.

4 In the District Court of the Fourth Judicial District of the Territory of Utah, County of Box Elder.

D. P. TARPEY, Plaintiff,
v.
ANDREW MADSEN, Defendant. } Answer & Cross-complaint.

The defendant above named, for answer to the complaint of the plaintiff herein, denies:

That on January 12, 1892, or at any other time or at all, the plaintiff was seized in fee or possessed or was entitled to the possession of the said land mentioned and described in the plaintiff's complaint, or any part or parcel of said land.

The defendant denies that afterwards, on the 12th day of January, 1892, or at any other time or at all, the plaintiff was seized of said lands or any part thereof; denies that the said plaintiff was then or at any other time or at all entitled to the possession of said land or any part thereof, and denies that said plaintiff was then or at any other time or at all in the possession of said land or any part thereof; and defendant denies that he afterwards, on the 12th day of January, 1892, or that he at any other time or at all entered into the possession of the said premises and ousted and ejected plaintiff therefrom; and the defendant denies that heretofore or that
4½ he now or at any other time or at all unlawfully or otherwise withholds the said premises or any part thereof from said plaintiff, to his damage in the sum of one hundred dollars or any other sum whatever or to the said plaintiff's damage or at all. Defendant denies that the rents, issues, and profits of said premises

from the 12th day of January, 1892, or at any other time, is or was $25.00 per month or any other sum or of any other value whatever.

This defendant further alleges that he holds the said property from James Hansen and wife by deed duly authenticated and recorded, and also that he is a citizen of the United States, over the age of twenty-one years, the head of a family, and a qualified and competent pre-emptor and homesteader, and that he has settlement rights upon and to said land; that he settled upon the said land on or about the — day of ——, 1888, and has ever since occupied, cultivated, and improved the same, in compliance with the laws of the United States applicable to the disposal of public lands to settlers, in order to mature title to himself; that he has made lasting and valuable improvements on said lands, such as a house, stable, stock yards, corrals, digged wells, planted gardens, and built roads, and has broken, cleared, and cultivated a large portion of said land, to wit, about 60 acres, and has fenced the whole of said lands and other improvements made and owned on said lands; that his improvements are reasonably worth and have permanently enhanced the value of the said lands to the extent of $3,000.

This defendant further alleges that the said land is and was at all times mentioned public land of the United States; that at the time the grant *the* the Central Pacific Railroad Company took effect the said land was cultivated, improved, occupied, claimed, appropriated, interdicted, reserved, and excepted land, and was not of the character contemplated by the grant to the said railroad company.

The defendant further alleges that the plaintiff watches, contracts for, and grades lands of the Central Pacific Railroad Company, and that he procures evidence in trials and hearings for it, and that he is its agent and representative; that on or about the 31st day of October, 1884, an agent of the said Central Pacific Railroad Company made out in writing, verified by oath, and presented to the register and receiver at Salt Lake City, Utah, selection list No. 3 of the Central Pacific Railroad Company for lands claimed to have been granted to it, and the above-described premises were included in the list, and the said agent falsely and fraudulently stated and represented that all of the lands in the said list contained were vacant, unappropriated, not interdicted, nor reserved lands, and were of the character contemplated by the grant to the Central Pacific Railroad Company, and the said land officers were deceived and mislead thereby into the allowance and approval of the same; that on or about the — day of ——, 1892, a contest was initiated under the laws governing the Land Department and the above facts were set forth before the register and receiver of the United States land office at Salt Lake City, Utah; that the honorable Commissioner of the General Land Office ordered a hearing, and that notice was served, and the Central Pacific Railroad Company appeared in the said proceedings, and the said plaintiff, D. P. Tarpey, land agent of the Central Pacific Railroad Company, appeared in the said proceeding, and the said case was tried under his management and direction; that when this action was commenced there was and

now is another action pending before said department between the same parties and for the same cause set forth in the complaint
6 in this action; that the said contest has not finally been determined, but the same is now being waged, and the said department is now proceeding to determine the question of title which the law submits to it.

Defendant, further answering and for defense, alleges that he and those under whom he purchased and through whom he claims and their vendors have been in the actual, peaceable, exclusive, and quiet possession of said lands and premises and held the same and every part thereof, with all the improvements thereon, openly, notoriously, and adversely to said plaintiff and to all the world, except the United States, for more than twenty-eight years next last past and prior to the commencement of this suit, and said cause of action is barred by the statute of limitations, as provided by sections 3130, 3131, 3132, 3133, and 3134, pages 220, 221, Compiled Laws of Utah, 1888, title 11, chapter 1; and defendant here specially pleads and relies on the statute of limitations as a complete defence to this suit.

Defendant, further answering and for further defense, alleges:

That the said plaintiff, D. P. Tarpey, claiming the southwest quarter of section twenty-nine, township ten north, of range two west, the land described in the complaint, through the Central Pacific Railroad Company, on or about the 26th day of April, 1890, entered into a purported agreement to sell the same to one A. H. Snow; that the said A. H. Snow attempted to purchase the same while this defendant, Andrew Madsen, was in the open and notorious possession of the same, and the said premises were well known to said Snow, who took said land well knowing the right and claim of this defendant, Andrew Madsen, thereto, and therefore took the pretended title subject to the rights of Madsen, the plaintiff
7&8 herein; that afterwards, to wit, on the 25th day of April, 1891, the said A. H. Snow commenced an action, No. 3108, "A. H. Snow *v.* Andrew Madsen," in this court, in ejectment, for the possession of the said land and for damages and for rents, issues, and profits; that afterwards, to wit, on the 21st day of September, 1891, the said defendant, D. P. Tarpey, and his wife delivered a purported deed to the said A. H. Snow, pretending to convey the said premises.

That afterwards, to wit, on the 6th day of June, 1891, at Brigham City, Box Elder county, Utah Territory, and while the said suit No. 3108, "A. H. Snow *v.* Andrew Madsen," was pending in the said district court, this defendant, Andrew Madsen (defendant in the original complaint), and the said A. H. Snow entered into an agreement in writing, under their hands and seals, of which the following is a copy:

"(Duplicate.)

This agreement, made and entered into this 6th day of June, 1891, between Andrew Madsen, the party of the first part, and A. H. Snow, the party of the second part, witnesseth: That the said party of the

first part, in consideration of $1, the covenants and agreements on the part of the said party of the second part hereinafter contained, agrees to sell unto the said party of the second part, all that certain lot, piece, or parcel of land, situate, lying and being in the county of Box Elder, and Territory of Utah, and bounded and described as follows, to wit: the southwest quarter of section 29, T. 11, N. R. 2 W., for the sum of $500 lawful money of the United States. And the said party of the second part in consideration of the premises within 60 days agrees to pay to the said party of the first part the said sum of $500, on the execution of these presents. In the event of a failure to comply with the terms hereof by the said party of the second part, the said party of the first part shall be released from all obligations in law or in equity to convey said property. And the said party of the second part shall forfeit all right thereto. And the said party of the first part, on receiving such payment at the time and in the manner above mentioned, agrees to execute and deliver to the said party of the second part, or to his assigns, a quit-claim deed. And it is understood that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators, of the repective parties.

In witness whereof the parties to these presents have hereunto set their hands and seals, the day and year first above written.

ANDREW MADSEN. [SEAL.]
A. H. SNOW. [SEAL.]

The party of the first part hereby agrees to extend the time of payment of the above $500, 30 days, and the party of the second part agrees to pay in consideration of the extension interest on the same at 12 per cent. per annum.

Dated Aug. 6, 1891.

ANDREW MADSEN.
A. H. SNOW."

9 That before the time for the defendant Madsen to perform the conditions on his part the said Snow gave notice to the defendant that he had determined not to take the land, and the said A. H. Snow abandoned the agreement and ever since wholly failed to perform it.

That the said plaintiff, Tarpey, had full knowledge of the above agreement and of its having — made and entered into, and of the fact that the said Snow had abandoned the said agreement and had wholly failed to perform it, and of the fact that the said Snow had under the said agreement forfeited all right to the said land, and of the open and notorious possession of the same by the said defendant, Madsen; nevertheless, on the 11th day of January, 1892, the said plaintiff pretended to purchase of the said Snow the said land and premises, with full knowledge of the above facts, and pretended to take a purported conveyance, of which the defendant had no knowledge until Jan. 11, 1894, from the said Snow and wife to him, said Tarpey, for the said land and premises so by him, said Snow, forfeited.

And, having fully answered all the allegations of the complaint, the defendant prays hence to be dismissed with costs; and should the plaintiff prove a better title to said property, then and in that event this defendant asks judgment for the full value of all lasting improvements made upon said lands by this defendant or by those under whom he holds the same, in accordance with sections 2761, 2762, etc., of "An act concerning occupying claimants," Compiled Laws of Utah, 1888, vol. 11, page 127.

B. H. JONES,
Attorney for Defendant.

10 TERRITORY OF UTAH, } ss:
County of Box Elder, }

B. H. Jones, being first duly sworn, deposes and says that he is the attorney for the defendant in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge except as to those matters therein stated on information and belief, and that as to those matters he believes it to be true.

The reason affiant verifies this answer is because defendant is absent from this county where af-iant resides, and therefore unable to verify it.

B. H. JONES.

Subscribed and sworn to before me this 6th day of April, 1894.
R. H. JONES,
Notary Public.

Marked: Filed May 14, 1894.

11 In the District Court of the First Judicial District of the State of Utah in and for Box Elder County.

D. P. TARPEY, Plaintiff,
v.
ANDREW MADSEN, Defendant. } Bill of Exceptions.

Be it remembered that this cause came on regularly for trial and was tried by this court with a jury on Nov. 18, 1897, whereupon the following proceedings were had:

The plaintiff proved by competent evidence:

1. That on June 28, 1861, the Central Pacific Railroad Company of California was duly incorporated and organized under the general laws of the State of California, and thereby authorized and empowered to construct a railroad from Sacramento, in the State of California, and to receive the land grants made by the acts of Congress hereinafter mentioned.

2nd item. That on October 8th, 1864, the said Central Pacific Railroad Company of California, with lawful authority, duly amended its articles of incorporation, and thereby became authorized and empowered to continue the construction of the railroad provided for and contemplated by the acts of the Congress herein-

after mentioned, and to receive the land grants made by those acts.

3rd item. That on July 1, 1862, the Congress of the United States, by its act approved on that day printed in volume 12 of the United States Statutes, on page 289 and following, authorized and empowered the said Central Pacific Railroad Company of Cali-
12 fornia to construct the road, and made it a grant of lands, as therein provided; which act was thereafter amended by the act approved July 2, 1864, as printed in vol. 13 of the United States Statutes, on page 356 and following.

4th item. That within the time allowed therefor the said Central Pacific Railroad Company of California duly filed its assent to the said act of July 1st, 1862, definitely fixed its railroad from Sacramento, in California, to a point at or near Ogden, Utah, and filed maps of the definite location thereof in the office of the Secretary of the Interior. The map of the definite location of that part of said road which extends from Monument Point to Ogden was accepted and approved by the Secretary of the Interior on October 20, 1868, and all of the said road extending from Sacramento to Ogden was constructed and accepted prior to the year 1870.

5th item. That on June 23rd, 1870, the said Central Pacific Railroad Company of California and the Western Pacific Railroad Company, under authority of the laws of California, duly amalgamated and consolidated together, vested all their franchises, rights, lands, and other properties in and reincorporated as the Central Pacific Railroad Company, and thereby the said railroad company became the owner, amongst other property, of all the lands granted to the said Central Pacific Railroad Company of California by the acts of Congress approved July 1st, 1862, and July 2nd, 1864, hereinbefore mentioned.

6th item. That the southwest quarter of section 29, in tp. 11 north, of range 2 west, of the Salt Lake meridian, United States survey, is part of an odd-numbered section of land lying in Box Elder county, Utah, and within ten miles on the north side of that portion of the said Central Pacific railroad which extends from Monument Point to Ogden, as the said road was definitely fixed, as shown upon the map of definite location, accepted and approved on October 20, 1868, as aforesaid, and as the road was constructed and accepted.

13 7th item. That the said land was surveyed by the United States and plat thereof filed in *in* the United States land office at Salt Lake City, the proper land office therefor, during the year 1869.

8th item. That the land is not and never was mineral or swamp land nor returned nor denominated as mineral land, and at that time when that portion of the road extending from Monument Point to Ogden was definitely fixed and the said map of definite location thereof accepted and approved, as aforesaid, the said land was agricultural in character, and there was no filing of any kind or description against the land; and the same was not swamp land

nor mineral land, nor was it included in any military or Indian reservation.

9th item. That on October 1st, 1870, the plaintiff duly made, executed, and delivered a mortgage covering all lands granted by the said acts of Congress to secure the payment of $10,000,000, payable on October 1st, 1890, which mortgage was duly acknowledged and certified as acknowledged on or about October 1st, 1870, and was duly recorded in the office of the county recorder of Box Elder county, Utah, March 12, 1873. On October 1st, 1890, the debt secured by the said mortgage had not been paid, and on that day the plaintiff duly made, executed, and delivered a new mortgage, covering the same lands, to secure payment of the same debt, which mortgage was duly acknowledged, certified, and recorded in the county recorder's office of Box Elder county during the year 1890 and remains unpaid.

BYRON GROO, a witness called on behalf of plaintiff and duly sworn, testified as follows:

I am the register of the United States land office in Salt Lake City, and as such have the custody of the records of that office and produce the same here in court. I produce from among
14 these letters a paper marked "List three," which is the selection list made by the Central Pacific railroad to the Salt Lake land office, Utah, and that list was filed in that office November 4, 1884, and shows a selection of the lands in controversy here for patent by the Central Pacific Railroad Company, and on that the costs and fees of surveying and other charges of the land office and surveyor's general's office were paid by the said railroad company.

This book which I produce is the official plat book of the records of the land office and shows the land in controversy. The lands in controversy were surveyed by the surveyor general on September 12, 1856, and the records of the land office show that the land was returned as agricultural land. From the records of the land office it shows that there were no filings made on or prior to the 20th day of October, 1868, of any kind or character whatever upon or against the land in controversy, and the land in controversy is not swamp land nor mineral land nor included in any military or Indian reservation, and the records of the land office, now in my possession and produced here, show that on or before October 20, 1868, there was not any pre-emption, homestead, or other claim or filing of any kind or character or description whatsoever upon or against this land in controversy.

On cross-examination the witness testified:

These records show that on May 29, 1869, declaratory statement numbered 802 was filed in the land office against the land in controversy, alleging a settlement to have been made thereon on April 23, 1869.

The land office in Salt Lake was not opened until April or May, 1869.

On June 20, 1896, a homestead entry of Andrew Madsen was filed in the land office against the land in controversy.

And thereupon Mr. Kimball, of counsel for defendant, stated
15 in connection with this cross-examination: I offer in evidence a United States patent dated August 21, 1896, issued to Andrew Madsen, signed by the President of the United States, and under the seal of the General Land Office; and I will state that this patent was delivered to Mr. Madsen.

And thereupon Mr. Rogers, of counsel for plaintiff, stated: I object to the offer as an offer of immaterial, irrelevant, and incompetent evidence.

And after argument upon the objection the court overruled the same; to which the plaintiff then and there duly excepted.

And the said patent was received in evidence, and was dated August 21, 1896, and purported to convey the land in controversy from the Government of the United States to the defendant, Andrew Madsen, based upon his homestead entry, instituted and made in the United States Land Office on January 20, 1896.

On redirect examination the witness testified:

This paper which I produce comes from *from* the record of the land office, is a declaratory statement; and the same was thereupon read and offered in evidence, and was as follows:

"*Declaratory Statement for Cases where the Lands are not Subject to Private Entry.*

I, Moroni Olney, of Box Elder county, Utah Territory, being a citizen of the United States and the head of a family, have on the 23rd day of April, 1869, settled and improved the S. W. ¼ of section 29, tp. 11 north, of range 2 west, in the district of lands subject to sale, at the land office in Salt Lake City, Utah, and containing 160 acres, which land has not yet been offered at public sale, and thus rendered subject to private entry, and I do hereby declare my intention to claim said tract of land as a pre-emption right under the provisions of said act of 4th September, 1841.

16 Given under my hand this 29th day of May, 1869.

(Signed) MORONI OLNEY.

In the presence of—
ABRAHAM HUNSAKER."

Thereupon the witness testified:

This record which I produce is the record and judgment docket of the decisions of the register and receiver of the United States land office at Salt Lake City. The defendant Madsen filed a contest in the land office at Salt Lake City against the selection list of this land for patent by the Central Pacific Railroad Company, and a hearing was ordered upon that contest, and the register and receiver decided, as is shown from this record and judgment docket, as follows: "We find that the tract in question, which is the S. W. ¼ of section 29, twp. 11 north, of range 2 west, of the Salt Lake meridian, was settled upon and occupied and claimed by a qualified entryman, to wit, Moroni Olney, prior to October 20, 1868, which therefore excepted

the land from the operation of the grant of Congress to the Central Pacific Railroad Company."

Thereupon, on redirect examination, the witness testified:

This decision of the register and receiver was appealed from to the Commissioner of the General Land Office, and he rendered his decision, affirming the decision of the register and receiver, and no appeal was ever taken from his decision, and I have here, from among the records of the land office, a written decision of the Commissioner of the General Land Office affirming the decision of the register and receiver.

And thereupon the paper was offered in evidence and read, and showed that the Commissioner of the General Land Office affirmed the decision of the register and receiver before mentioned upon the same grounds and for the same reasons.

17 Thereupon plaintiff offered and the court received in evidence a deed from the Central Pacific Railroad Company, as grantor, to the plaintiff, D. P. Tarpey, as grantee, dated August 17, 1891, duly executed, certified, and acknowledged and purporting to convey to the said Tarpey the lands in controversy.

Thereupon Mr. Rogers, of counsel for plaintiff, stated: "We now move the court to strike from the record the defendant Madsen's Exhibit One, being a patent purporting to convey to him the lands in controversy, dated August 21, 1896, upon the ground that the same is immaterial, irrelevant, and incompetent; and upon the further ground that it now appears affirmatively from the evidence and record in this case that the Land Department of the United States Government has made a mistake of the law in attempting to convey the land in controversy to the defendant in August, 1896, when at that time the same did not belong to the Government, but did belong to plaintiff, D. P. Tarpey, he having acquir*ing* title thereto by deed from the Central Pacific Railroad Company; and upon the further ground that the said patent was issued without authority of law; and on the further ground that it affirmatively appears from the evidence in this case that the Government of the United States had long prior to the date of the patent conveyed the lands in controversy to the Central Pacific Railroad Company, and that the title of the lands had by sundry mesne conveyances passed to the plaintiff; and on the further ground that the patent is only evidence of a junior title and is not evidence of the true title; and on the further ground that the undisputed evidence in this case shows that the true title to the land in controversy is not in the defendant, but is in the plaintiff."

And thereupon the court denied the said motion; to which the plaintiff then and there excepted.

18 And thereupon the defendant admitted that during all the times mentioned in the complaint he was in possession of the lands in controversy, and it was stipulated upon the trial that the amendments to the complaint may be taken as specifically denied by the defendant as far as it related to the title or claim of title of the defendant.

And thereupon plaintiff rested his case.

And then came the defendant, and by Mr. Kimball, his counsel, moved the court to enter a judgment of nonsuit against the plaintiff in this action upon the ground that the evidence shows the title to the land in controversy to be in the defendant, and that at the time of the beginning of this action the title to the land in controversy was in the United States of America; which motion for nonsuit was by the court allowed, rendered, and entered; to which ruling the plaintiff then and there duly excepted.

And thereupon a judgment of nonsuit was duly entered in said action dismissing the plaintiff's complaint and awarding the defendant judgment for his costs.

And thereupon the court duly made and entered an order giving the plaintiff 60 days from the date thereof in which to prepare, serve, and present his bill of exceptions.

19 *Assignment of Errors.*

The plaintiff assigns that the court erred in overruling the motion to strike from the record the Defendant's Exhibit One, being the patent theretofore introduced in evidence by the defendant.

2. That the court erred in granting the defendant's motion of judgment of nonsuit.

And whereas these matters and things not otherwise appearing of record, this bill of exceptions is duly presented to the court within the time allowed therefor, and by consent of counsel for defendant is duly allowed and certified as being full, true, and correct.

January 9, 1898.

CHARLES H. HART, *Judge.*

The foregoing bill of exceptions is agreed to.

EVANS & ROGERS,
Attorneys for Plaintiff.
B. H. JONES,
KIMBALL & KIMBALL,
Attorneys for Defendant.

20 In the District Court of the First Judicial District of the State of Utah in and for the County of Box Elder.

D. P. TARPEY, Plaintiff,
v.
ANDREW MADSEN, Defendant.

Please take notice that the plaintiff in the above-entitled action hereby appeals to the supreme court of this State from the judgment herein made and entered in the said district court on the 18th day

f November, 1897, in favor of the defendant in said action and against the plaintiff and from the whole and every part thereof.

L. R. ROGERS,
D. EVANS,
Attorneys for Plaintiff.

February 4th, 1898.

To the clerk of said court and to Messrs. B. H. Jones & Kimball & Kimball, attorneys for defendant.

Filed Feb. 4, 1898.

21 D. P. TARPEY, Plaintiff,
v.
ANDREW MADSEN, Defendant.

To the honorable supreme court:

We, the undersigned, attorneys for the plaintiff and defendant in the foregoing action, do hereby certify that this transcript is correct.

And we further certify that the appellant has duly and within time filed an undertaking on appeal sufficient in form and amount.

Feb. 4, 1898.

L. R. ROGERS,
D. EVANS,
Attorneys for the Plaintiff.
B. H. JONES,
KIMBALL & KIMBALL,
Attorneys for Defendant.

Marked: Filed February 11, 1898. Lilburn P. Palmer, clerk supreme court, Utah.

22 In the Supreme Court of the State of Utah, Regular May Term.

MAY 13, 1898.

D. P. TARPEY, Appellant,
v.
ANDREW MADSEN, Respondent.

This cause, coming on regularly to be heard, was argued by Mr. L. R. Rogers, in behalf of the appellant, by Mr. B. H. Jones, in reply, was submitted and by the court taken under advisement.

Title of Court and Cause.

JULY 1, 1898.

This cause, having been heretofore argued and submitted, and the court being sufficiently advised thereon, it is now here considered, ordered, and adjudged that the judgment be, and the same is hereby, affirmed.

23 In the Supreme Court of the State of Utah.

D. P. TARPEY, Appellant,
v.
ANDREW MADSEN, Respondent.

ZANE, *C. J.:*

This is an action to try the title and to recover the possession of the southwest quarter of section 29, in township 11 north, ranger 2 west, of the Salt Lake meridian.

The plaintiff claims title by virtue of a deed of conveyance by the Central Pacific Railroad Company to him and the following grant of the United States to that company: "That there be, and is hereby granted to the said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United
24 States, and to which a pre-emption or homestead claim may not have attached, at the time the line of said road is definitely fixed." 12 U. S. Stat. at Large, p. 492.

Afterwards Congress passed another act, in force July 2, 1864, to amend the first-mentioned act of 1862. The third section of this latter act contains the following provision: "Any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp-land, or other lawful claim, or include any Government reservation or mineral lands, or the improvements of any *bona fide* settler." 13 U. S. Stat. at Large, p. 358.

The exception from the grant in the last law is more comprehensive than the one contained in the first. It declares the grant shall not defeat or impair any pre-emption, homestead, or other lawful claim, nor include the improvements of any *bona fide* settler.

The first act excepted from the grant all lands to which homestead or pre-emption claim should attach before the line of the road was definitely fixed, while the latter act excepted not only pre-emption and homestead claims, but all other lawful claims to the land, and all improvements of *bona fide* settlers on the land as well.

The line of the road of defendant's grantor, at the point in question, was definitely fixed and survey thereof was filed in the office of the Secretary of the Interior on October 20, 1868. The land in dispite is part of a section located within the twenty-mile limit and is designated by an odd number, and had not been sold, reserved, or otherwise disposed of by the national Government, nor had a homestead claim attached to it. It was within the grant unless a pre-emption right had lawfully attached to it at the time the
25 line of the road was definitely fixed and the survey thereof had been filed in the office of the General Land Office.

Section 2 of an act of Congress approved July 16, 1868, and in

force on that day, made the late Territory of Utah a land district and authorized the President to appoint a surveyor general, a register, and a receiver of public moneys for the same, with the same powers and duties and entitled to the same compensation prescribed by law in relation to land offices of the United States in the Territories. 15 U. S. Stat. at Large, 19.

Section 3 of the same act provides "that the Secretary of the Interior is hereby authorized to locate said offices of surveyor general, register and receiver of public moneys at some suitable place in the Territory;" and section 4 extended the pre-emption, homestead, and other laws of the United States applicable to the disposal of the public lands over the Utah district.

It appears from the record that one Moroni Olney, a citizen of the United States and the head of a family, settled upon the land in dispute after July 16 and before October 20, 1868, intending to claim a pre-emption right to it, and that he was in the actual possession thereof upon the last-named day, but that he did not make known his claim in writing to the register of the land office until May 29, 1869, because the register did not open his office until that time; that he did make known his claim in writing to the register on that day, in which he described the land in dispute.

Sec. 2265, Rev. Stat. U. S., 1878 (2nd ed.), provides "that every claimant under the pre-emption law for land not yet proclaimed for sale is required to make known his claim in writing to the register of the proper land office within three months from the time
26 of the settlement, giving the designation of the tract, and the time of settlement; otherwise his claim shall be forfeited, and the tract awarded to the next settler in the order of time on the same tract of land who has given such notice, and otherwise complied with the conditions of the law."

Sec. 2267, *id.*, requires the proof and payment for the lands claimed within thirty months after the date prescribed therein for filing the declaratory notice.

Sec. 2270, *id.*, declares that "Whenever the vacancy of the office either of register or receiver, or of both, renders it impossible for the claimant to comply with every requisite of the pre-emption laws within the appointed time, such vacancy shall not operate to the detriment of the party claiming in respect to any matter essential to the establishment of his claim; but such requisition must be complied with within the same period after the disability is removed, as would have been allowed had such disability not existed."

After July 16, 1868, Utah Territory constituted a land district, and the offices of surveyor general, register, and receiver were created, but the appointments were not made and the offices opened until May of the following year, but the pre-emption, homestead, and the other laws of the United States applicable to *to* the disposal of public lands were extended over the district when the law took effect on the 16th day of July, mentioned above, and we must regard a vacancy as existing in those offices until the officers entered upon the discharge of their duties in the following May. The land in the district was not proclaimed for sale until after the last-named

date, and the pre-emption claimant could not make known his claim in writing to the register until he entered upon his duties, and the pre-emptor had three months after he did within which to do so.

27 It appears from the record that Olney filed his declaratory statement with the register in less than a month after the office of register was filled. Having settled upon the land in question before the railroad company established its line of definite location and filed its survey or map thereof in the General Land Office, and having filed his declaratory statement with the register of the land office of the district within the time allowed by law, we must hold that Olney's pre-emption claim had attached to the land in question and existed thereon before the right of the Central Pacific railroad became fixed, and that the land in dispute did not pass by the grant relied upon.

As we have seen, the act of Congress in force on July 16, 1868, created a land district consisting of the late Territory of Utah, and authorized the appointment of a surveyor general, register, and receiver of public moneys, with the same powers and subject to like duties given to and imposed upon like officers in the other Territories, and the same law extended the pre-emption, homestead, and other laws of the United States applicable to the disposal of its public lands over it. After the creation of the land district and the extension of such laws over it, persons having the qualifications mentioned in the law were authorized and had the lawful right to settle upon the public lands therein subject to pre-emption and the right to improve the same, and by so doing they acquired lawful rights thereto. This, it appears from the record, Moroni Olney *done*, and it appears he complied with the rwquirements of the law as far as possible before the register of the land office was appointed, and that within a month thereafter he filed the declaratory statement the law required.

28 When the acquisition of a right by an individual depends upon an act required of him within a specified time, and he is deprived by the Government or person exacting it of the opportunity to do it then, but does it as soon as an opportunity is afforded later, the law will accept such performance and secure him the right. Likewise when an individual in the prosecution of a lawful right does everything required of him as far as he is able, and fails in some particular because a public officer fails to discharge a duty towards him, the law will protect him. And the law having provided, as we have seen, that Mr. Olny might settle on the land in dispute and acquire a pre-emption right to it, upon filing with the register of the land office of the district, within three months after such settlement, his declaratory statement, and there be-ng no register until the expiration of six months thereafter to whom he could deliver it, and he having delivered his statement about the expiration of that time, the law protected his pre-emption right.

Baty *v.* Sale, 43 Ill., 351.
Kile *v.* Tubbs, 23 Cal., 432.
Lytle *v.* State of Arkansas, 50 U. S., 314.
The Yosemite Valley Case, 15 Wall., 77.

In the case of Kile *v.* Tubbs, *supra*, the court said: "In this case it appears the plats of the U. S. surveys of this land have not been sent to the proper land office, so that it is out of the power of the defendant to file his notice of claim to pre-emption, or to enter and purchase the land under the United States laws; so he has done all in his power, and has lost no rights acquired under those laws."

In the case of Baty *v.* Sale, *supra*, it was held, where land was temporarily withdrawn from the market, and a party had filed
29 his declaration of an intention to pre-empt it, the officers of the Land Office did right in excluding the time the land was not subject to entry in computing the year within which he had the right to make his proof and enter the land.

When Olney, the pre-emptioner in this case, filed his declaratory statement his right must be deemed in law to relate to the date of his settlement on the land in dispute. Therefore he had a lawful claim upon it when the grant to the railroad took effect, and the land in dispute was not included in it.

The grant of land to the Central Pacific Railroad Company took effect when the line of definite location of its road was made and the survey filed in the General Land Office, but it did not include the land in dispute, because it was at that time subject to the lawful right of Olney, a pre-emptor. But when he afterwards failed to comply with the requisites imposed in order to obtain a title the land became a part of the public lands of the United States and was thereafter subject to the homestead entry of the defendant, Andrew Madsen, or to other entry or pre-emption. It did not vest in the railroad company. Its grant was *in præsenti*, and such land as was excepted at the time it took effect did not pass to it afterwards. When Olney afterwards abandoned or lost his right the land did not become subject to the operation of the grant.

Hastings, etc., Railroad Co. *v.* Whitney, 132 U. S., 357.
Kansas Pacific R'y Co. *v.* Dunmeyer, 113 U. S., 629.

In view of the facts appearing from the record we hold the lands in dispute were subject to entry by the defendant, Andrew Madsen, on June 20, 1896, and that the patent of August 21, 1896, passed the title to him.

The judgment is affirmed.

We concur.
BARTCH, *J.*
HILES, *Dist. Judge.*

30 In the Supreme Court of the State of Utah.

D. P. TARPEY, Plaintiff and Appellant,
vs.
ANDREW MADSEN, Defendant and Respondent. } Application for Writ of Error.

Now comes the defendant, D. P. Tarpey, and says that in the final judgment rendered by the supreme court of the State of Utah herein on the 1st day of July, 1898, and in the proceedings had prior

thereto certain errors were committed to the prejudice of said plaintiff, which will more in detail appear from the assignment of errors to be filed as a part of this petition, and further says that in the final judgment and decree of the first judicial district court of Box Elder county, Utah, in this cause a decision was had against the validity of certain statutes of the Congress of the United States and against the title of the plaintiff to certain lands situated in the State of Utah to which he claimed title under certain statutes of the United States—that is to say, the Pacific Railroad land grants—which was drawn in question by said litigation, the plaintiff claiming that the lands mentioned and described in said action were lands which were granted to the Central Pacific Railroad Company of California under the terms and provisions of the said Pacific Railroad land grants, and the defendant claiming and contending that the title of
31 the United — did not pass to the said Central Pacific Railroad Company of California under any or either of said land grants and acts of Congress, and the plaintiff claiming to be the grantee of the said Central Pacific Railroad Company of California.

That the decision of the first judicial district court, wherein the said cause was tried, was against the authority and validity of the claim of the plaintiff, and the decision of the supreme court was against the authority and validity of the claim of the said plaintiff.

Wherefore this plaintiff prays that a writ of error may issue in his behalf to the supreme court of the State of Utah for the correction of the errors so complained of, and that the transcript, papers, and records in this cause, together with the opinion of this honorable court herein, all duly authenticated, may be sent to the Supreme Court of the United States.

July 16, 1898.

LINDSAY R. ROGERS,
Att'ys for Plaintiff, D. P. Tarpey.

32 In the Supreme Court of the State of Utah.

D. P. TARPEY, Plaintiff and Appellant,
v.
ANDREW MADSEN, Defendant and Respondent.

Allowance of Writ of Error.

On this 16th day of July, 1898, came the said D. P. Tarpey, plaintiff, by his attorney of record herein, Lindsay R. Rogers, and filed and presented herein a petition praying for the allowance of a writ of error intending to be urged by him; praying also that a duly authenticated transcript of the record, proceedings, papers, and opinion upon which the judgment herein was rendered may be sent to the Supreme Court of the United States, and that such full and fair proceedings may be had as may be proper in the premises.

In consideration thereof I, Charles S. Zane, chief justice of the supreme court of the State of Utah, do hereby allow the writ of

error upon the plaintiff giving bond according to law in the sum of $500.00.

C. S. ZANE,
Chief Justice.

Marked: Filed July 19, 1898. L. P. Palmer, clerk supreme court, Utah.

33 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Utah, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a suit which is in the supreme court of the State of Utah, before you, being the highest court of law or equity of said State in which a decision could be had in said State between D. P. Tarpy, plaintiff, and Andrew Madsen, defendant, wherein was drawn in question construction of statutes of the Congress of the United States and your decision was against the title specially set up and claimed to the real property in dispute in said action which the plaintiff claimed title to by virtue of land grants from the United States to the plaintiff's predecessor in interest, evidenced by acts of Congress of the United States, and your decision was against the validity of said title specially set up and claimed under such statutes, and manifest error hath happened, to the great damage of said D. P. Tarpey, as by his complaint appears, we, being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within 60 days of the date hereof, *and* that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done
34 therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this 16th day of July, in the year of our Lord one thousand eight hundred and ninety-eight.

Seal United States Circuit Court, District of Utah.

JERROLD R. LETCHER,
Clerk U. S. Circuit Court, District of Utah,
By JOHN W. CHRISTY, *Deputy.*

Allowed by—
C. S. ZANE,
Chief Justice of the Supreme Court of the State of Utah.

[Endorsed:] 911. Tarpey *vs.* Madsen. Writ of error. Filed Jul- 19, 1898. Lilburn P. Palmer, clerk supreme court, Utah.

35 In the Supreme Court of the State of Utah.

D. P. TARPEY, Plaintiff and Appellant,
vs.
ANDREW MADSEN, Defendant and Respondent. } Assignments of Error.

1. The court erred in affirming the judgment of the trial court.

2. The court erred in holding that the title to the land in dispute did not pass from the United States of America to the Central Pacific Railroad Company of California under the acts of Congress of July 1, 1862, and July 2, 1864, said acts being found and printed in volume 12 of the United States Statutes, pages 289 and following, and volume 13 of the United States Statutes, on page 356 and following, respectively.

3. The court erred in holding and deciding that the mere residence, settlement, and cultivation of the land in dispute by Moroni Olney prior to October 20, 1868, exempted the land and the title thereto from passing from the United States to said railroad company.

4. The court erred in holding and deciding that the lands in dispute were public lands of the United States, and that such were subject to entry by the defendant, Andrew Madsen, on June 20, 1896.

36 5. The court erred in holding and deciding that the patent of August 21, 1896, from the Government of the United States to Andrew Madsen passed any title whatever to him.

July 16, 1898.

LINDSAY R. ROGERS,
Attorney for Plaintiff, D. P. Tarpey.

[Endorsed:] 911. Tarpey *vs.* Madsen. Assignment of error. Filed Jul- 19, 1898. Lilburn P. Palmer, clerk supreme court, Utah.

37 In the Supreme Court of the United States.

D. P. TARPEY, Plaintiff and Appellant,
vs.
ANDREW MADSEN, Defendant and Respondent. } Citation.

To Andrew Madsen, defendant in error:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden in Washington, in the District of Columbia, within 60 days of the date of this citation, pursuant to writ of error filed in the clerk's office of the supreme court of the State of Utah, at Salt Lake City, Utah, wherein D. P. Tarpey is plaintiff in error and you, the said Andrew Madsen, are defendant in error, to show cause, if any there be, why the judg-

ment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this the 16th day of July, 1898.

C. S. ZANE,
Chief Justice Supreme Court, State of Utah.

37½ I hereby acknowledge due and legal service of the within citation this 22nd day of July, 1898.

B. H. JONES,
Attorney of Record for Defendant, Andrew Madsen.

38 In the Supreme Court of the State of Utah.

D. P. TARPEY, Plaintiff and Appellant,
v.
ANDREW MADSEN, Defendant and Respondent. } Bond.

Know all men by these presents that we, D. P. Tarpey, as principal, and James McTerney and Wm. Keyting, as sureties, are held and firmly bound unto the defendant, Andrew Madsen, in the full and just sum of $500.00, to be paid to said defendant, Andrew Madsen, his heirs or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs and personal representatives, jointly and severally, by these presents.

Sealed with our seals and dated this 19th day of July, 1898.

Whereas lately, in the supreme court of the State of Utah, in the suit depending in said court between said plaintiff, D. P. Tarpey, and the said defendant, Andrew Madsen, a judgment was rendered against the said Tarpey, and he having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to said Andrew Madsen, citing and admonishing him to be and appear at a term of the Supreme Court of the United States, holden at the seat of government, at Washington, within 60 days of the date of said citation:

39 Now, the condition of the above obligation is such that if said D. P. Tarpey shall prosecute said writ of error to effect and answer all damages and costs if he fails to make the plea good then the obligation to be void; else to remain in full force and virtue.

D. P. TARPEY. [SEAL.]
JAMES McTERNEY. [SEAL.]
WM. KEYTING. [SEAL.]

Sealed and delivered in the presence of—
ERNEST WILLIAMS.

Approved by—
C. S. ZANE,
Chief Justice of the Supreme Court of the State of Utah.

40 UNITED STATES OF AMERICA, }
State of Utah, } ss:

I, Lilburn P. Palmer, clerk of the supreme court of the State of Utah, in pursuance of a writ of error allowed in the case wherein D. P. Tarpey is plaintiff in error and Andrew Madsen is defendant in error, do return attached hereto a transcript of the record and proceedings, opinion, bond, and order allowing writ of error, together with the original citation, writ of error, and assignment of errors, all in and of said court and cause, to the Supreme Court of the United States; and I hereby certify that said attached transcript of said record and proceedings, opinion, bond, and order allowing writ of error is a full, true, and correct copy of the several originals thereof now on file or of record in my office.

In witness whereof I have hereunto set my hand and affixed the seal of the supreme court of the State of Utah, this 9th day of August, A. D. 1898, at Salt Lake City, Utah.

LILBURN P. PALMER,
Clerk Supreme Court of Utah.

Endorsed on cover: Case No. 16,961. Utah supreme court. Term No., 376. D. P. Tarpey, plaintiff in error, *vs.* Andrew Madsen. Filed August 22d, 1898.